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Patrick Baude

Indiana University School of Law

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An Appreciative Note on Mr. Justice Douglas' View of the Court's Role in Environmental Cases

PATRICK BAUDE*

Probably the most visible feature of William O. Douglas' public career as a citizen has been the inspired passion with which he campaigns for the importance of the uncivilized wild for civilized men and women. In his writings off the Court, most notably *A Wilderness Bill of Rights* in 1965, he has blended eloquent nature-writing with concrete suggestions for institutional reform.¹ Within the movements we now call environmental there are many strains: some worry about changing the diseases which automobile exhaust will inflict on us and altering the means by which inert substances may be extracted from their containers. Others (although of course the two groups are overlapping and both reflect to some degree vital concerns of most non-suicidal people) champion trees and lakes and birds either for their own sake or for the dignity and beauty they can lend to troubled and hectic human life.²

These latter champions, of which William O. Douglas is one, are not unaware that wilderness by definition cannot be made part of the daily experience of two hundred million people. As a result, "[m]uch is made of the point that those who love the wilderness are not only in the minority but from upper classes who can afford the luxury of trail travel."³ Douglas' reply is based in part on the fact that *opportunity* for access to the wilderness is not limited to the wealthy⁴—even if some find it hard to shake the belief that here the poor are undergraduate scholarship students rather than welfare mothers—and in larger part on the importance of providing opportunities for any minority. "Those who love the wildness of the land and who find exhilaration in backpacking and sleeping on the ground may be idiosyncratic; but they represent values important in a free society."⁵

* Professor of Law, Indiana University, Bloomington.

¹ For balanced criticism of some of the specific suggestions, see Tarlock, Book Review, 19 STAN. L. REV. 895 (1967).

² See generally J. PASSMORE, *MAN'S RESPONSIBILITY FOR NATURE* (1974).

³ W. DOUGLAS, *A WILDERNESS BILL OF RIGHTS* 18 (1965).

⁴ *Id.* at 18–19.

⁵ *Id.* at 26.

In whatever way history assesses Mr. Justice Douglas' public career as a judge, it will not find him one whose greatest goal was to divorce value or personal view from constitutional decision. It would thus hardly be surprising if the Justice's opinions in environmental cases dramatized the man's view of nature's dominant virtues. But in fact, Mr. Justice Douglas' opinions reflect in the main an institutional concern that the values of wilderness receive appropriate attention from those who must accommodate them with other interests and not a demand that the natural minority prevail.

The easiest way to ensure the prevalence of that minority would be to hold that there is a constitutionally protected right to environmental protection. Indeed the place to begin such an argument would now be the Douglas opinion for the Court in *Griswold v. Connecticut*,⁶ which, as John Hart Ely has pointed out, is not so indefensible as are the uses to which it has been put.⁷ One way to ennoble a new constitutional right is by the simple force of assertion that it must be so, or has always been so but never before needed judicial articulation.⁸ Another way is to demonstrate, however sketchily,⁹ an implicit connection between the right in question and an explicit text of the Constitution—the “emanations” and “penumbras” of *Griswold*. A third method is to derive from the paradoxes of judicial review the conclusion that the structure of representative democracy requires certain features, such as the right to vote or to be free of economic discrimination by legislation one has no right to participate in.¹⁰ The case for the environment is easiest made under the first method, but only because any case can be made by assertion. The case can be made under the second method largely by arguments approximating bad puns—pantheists worship nature, wilderness “speaks” to the human condition. The case might be made more seriously under the third method. A majoritarian legislature could be said to have the power to rule, absent compelling reasons, only over those who are entitled to a fairly representative role in influencing those political determinations.

We deal not with transitory matters but with the very earth itself. We who come this way are merely short-term tenants. Our power in wilderness terms is only the power to destroy, not to create. Those

⁶ 381 U.S. 479 (1965).

⁷ Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

⁸ E.g., *Roe v. Wade*, 410 U.S. 113 (1973).

⁹ E.g., *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8 (1969).

¹⁰ Cf. *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938); *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

who oppose wilderness values today may have sons and daughters who will honor wilderness values tomorrow. Our responsibility as life tenants is to make certain that there are wilderness values to honor after we have gone.¹¹

The real difficulty is not in discovering a pedigree for the environment so much as it is in giving practical effect to the view that such a constitutional right exists.¹² An injunction or declaratory judgment that oil not be spilled on the shore could be expected to expose its issuer to the fate of King Canute. Even so, the interests involved are so fundamental—so rooted in our past values, if not our Constitution, and so critical to our posterity if not to our domestic tranquility—that they should be recognized in order to assure their full consideration in governmental decisions. The law, after all, knows many rights whose importance it protects vigorously but which ought not to be the basis for invalidating legislation.

One of the most respectable ways, for example, in which courts use general considerations of social or economic policy is to uphold legislation which might otherwise be found to overreach a loosely defined power.¹³ Thus it was not a surprising opinion by Mr. Justice Douglas in which the Supreme Court recognized that Congress does not violate the fifth amendment by taking property for purposes not immediately practical:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to re-appraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.¹⁴

The interest in that case was the development of a sanitary (or even sterile) urban aesthetic rather than natural beauty; but Mr. Justice Douglas makes the connection with a revealing metaphor: "The misery of housing may despoil a community as an open sewer may ruin a river."¹⁵ More surprisingly to those who read Mr. Justice Douglas'

¹¹ W. DOUGLAS, A WILDERNESS BILL OF RIGHTS 26 (1965).

¹² See the brief discussion in C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 961 (1971).

¹³ See Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

¹⁴ Berman v. Parker, 348 U.S. 26, 33 (1954) (citation omitted).

¹⁵ *Id.*

concurring opinion in *Moreno*¹⁶ as a simple ideological defense of the commune, he again followed a course of deference to legislation asserted to promote the value of an uncongested residential environment through the exclusion of large non-family living groups.¹⁷

Recognition that environmental ends are important and constitutionally legitimate goals for governmental action in turn influences the way statutes with unclear purposes are read. In *Udall v. FPC*,¹⁸ the Supreme Court was called upon to mediate a conflict between the Federal Power Commission and the Secretary of the Interior. The Commission had determined that a particular hydroelectric power project was in "the public interest"; the Secretary of the Interior sought to reopen the administrative record in order to expand his earlier efforts to show that alternative power sources made immediate private development inappropriate. The Court's opinion, by Mr. Justice Douglas, did not require that the Secretary's view prevail; but it did require that the FPC develop the fullest possible record on an expanded view of what was in the public interest.

The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest', including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.¹⁹

If the Court is wrong in its judgment of what Congress deems the public interest, the remedy is easy in Congress. What the Court has done, in any event, is to make sure that the interests of the inarticulate future will be expressed as thoroughly as possible before present energy demands have their way.

The same theme may be found throughout the modern law of pre-emption,²⁰ strikingly illustrated in the recent case of *Burbank v. Lockheed*.²¹ The issue there was whether the city of Burbank could, in the interest of regulating aircraft noise, impose a nighttime curfew on jets at the local privately-owned airport. Federal legislation, amply surveyed both in Mr. Justice Douglas' majority opinion and in Mr. Justice Rehn-

¹⁶ *Department of Agric. v. Moreno*, 413 U.S. 528 (1973).

¹⁷ *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

¹⁸ 387 U.S. 428 (1967).

¹⁹ *Id.* at 450.

²⁰ See generally Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

²¹ 411 U.S. 624 (1973).

quist's dissent for himself and three others, evinced great concern with aircraft noise but was totally silent on the precise question—perhaps because one of the ways in which Burbank is unique is that it seems to be the only city where commercial flights use a privately owned airport, requiring legislative rather than proprietary authority to curtail night flights. If the preemptive intention of Congress were the key, nearly mystic qualities would be needed to divine what the Congress thought about the Burbank airport when it was thinking about something else instead. If immediate concern about the quality of the environment were the key, the curfew would be sustained. And earlier important cases on compensation for taking show Mr. Justice Douglas no defender of aircraft noise.²² If the key is to make sure that interests in quiet are coordinated across the country and balanced against needs for safety and efficiency (recognizing possibilities such as the design of less noisy engines and different flight paths) federal preemption until the FAA and EPA complete the studies and rule-making directed by the Noise Control Act of 1972²³ makes most likely an efficient solution to the problem. "Flexibility is gained by deciding a case on the pre-emption ground rather than on some other constitutional basis because pre-emption decisions invite congressional reconsideration and adjustment."²⁴

A wrong decision should not be justified on the basis that it is easier to reverse than a right one. But when answers are unclear and the possibility of environmental degradation threatens more than the ordinary legal sort of irreversibility, postponing final decision until fuller consideration is an independent virtue. That place for the "right to a decent environment" is the place Mr. Justice Douglas has found for it in the common law surrounding the Constitution.

²² *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

²³ 49 U.S.C. § 1431 (Supp. 1973).

²⁴ Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 *STAN. L. REV.* 208, 225 (1959).